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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 JAMES B. PINKERTON,

8 Plaintiff,

9 v.

10 HANSON MOTORS, INC. and STEVEN
11 W. HANSON,

12 Defendants.
13

CASE NO. C16-5634BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

14 This matter comes before the Court on Defendants Hanson Motors, Inc., and
15 Steven Hanson's (collectively "Hanson") second motion to dismiss for insufficiency of
16 process and insufficiency of service of process (Dkt. 17) and motion for extension of time
17 (Dkt. 23). The Court has considered the pleadings filed in support of and in opposition to
18 the motion and the remainder of the file and hereby grants in part and denies in part the
19 motion for the reasons stated herein.

20 **I. PROCEDURAL HISTORY**

21 On July 15, 2016, Plaintiff James Pinkerton ("Pinkerton") filed an employment
22 discrimination complaint against Hanson. Dkt. 1.

1 On December 15, 2016, Hanson moved to dismiss for insufficiency of process and
2 insufficiency of service of process. Dkt. 5. On February 8, 2017, the Court granted the
3 motion on the merits and granted Pinkerton leave to perfect service. Dkt. 11. On
4 February 17, 2017, Pinkerton filed an affidavit of service of summons and complaint
5 showing that Matthew Howard served the papers on Frank Kersul. Dkt. 15.

6 On March 8, 2017, Hanson moved to dismiss for insufficiency of process and
7 insufficiency of service of process. Dkt. 17. On April 6, 2017, Pinkerton responded.
8 Dkt. 22. On April 7, 2017, Hanson moved for an extension of time to reply. Dkt. 23. On
9 April 8, 2017, Pinkerton stipulated to the extension of time.¹ Dkt. 24. On April 12,
10 2017, Hanson replied. Dkt. 25.

11 II. DISCUSSION

12 Hanson seeks dismissal of Pinkerton's claims for insufficiency of service of
13 process. The plaintiff bears the burden of establishing the validity of service under Rule
14 4. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). In some instances, Rule 4
15 may be liberally construed "so long as the opposing party receives sufficient notice of the
16 complaint." *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d
17 1371, 1382 (9th Cir. 1984). The sufficient notice exception, however, is not a license to
18 ignore Rule 4. The Ninth Circuit has held that failure to comply with service
19 requirements does not warrant dismissal if: "(a) the party that had to be served personally
20 received actual notice, (b) the defendant would suffer no prejudice from the defect in
21

22 ¹ The motion is granted, and the Court will consider the reply.

1 service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the
2 plaintiff would be severely prejudiced if his complaint were dismissed.” *Borzeka v.*
3 *Heckler*, 739 F.2d 444, 447 (9th Cir. 1984). A party’s pro se status, alone, is not a
4 justifiable excuse for defective service. *See Hamilton v. Endell*, 981 F.2d 1062, 1065
5 (9th Cir. 1992).

6 In this case, it is undisputed that Pinkerton failed to perfect service. First, a factual
7 dispute exists whether Mr. Kersul is authorized to accept service on behalf of the
8 corporation. Mr. Kersul is the General Sales Manager in Olympia, and Mr. Howard
9 declares that employees at Hanson, including Mr. Kersul himself, informed him that Mr.
10 Kersul could accept service on behalf of the corporation. The Washington Supreme
11 Court has explained that an individual “‘must have some substantial part in the
12 management of its affairs generally or in a particular district or locality’” to be a
13 “‘managing agent” of a corporation for purposes of RCW 4.28.080(9). *Johanson v.*
14 *United Truck Lines*, 62 Wn.2d 437, 440 (1963) (citation omitted); *accord Shipp v. Mason*
15 *Gen. Hosp. Found.*, 147 Wn.App. 1023, 2008 WL 4868879, at *3–4 (2008). It would
16 appear that a general manager would be considered a managing agent under the relevant
17 statute. The Court, however, declines to resolve this issue at this time because Pinkerton
18 failed to deliver the correct documents.

19 Hanson contends that Mr. Howard served an amended complaint that varies from
20 the complaint on file. Pinkerton concedes this point, but contends the error was
21 “inadvertent and unintentional” Dkt. 22 at 2. Regardless of the reason for the error,
22 Pinkerton’s failure to serve the proper complaint is dispositive. *Galekovich v. City of*

1 *Vancouver*, 11-5736BHS, 2012 WL 750445, at *4 (W.D. Wash. Mar. 8, 2012) (“the
2 Court finds that the service was improper on all the foregoing Defendants and Holmes
3 because the complaint that Plaintiff attempted to serve was not the same complaint that
4 he filed in Court.”). Therefore, the Court grants Hanson’s motion on the merits.

5 The next issue is an appropriate remedy for Pinkerton’s second failure to perfect
6 service.

7 Upon determining that process has not been properly served on a
8 defendant, district courts possess broad discretion to either dismiss the
9 plaintiff’s complaint for failure to effect service or to simply quash service
10 of process. However, dismissal of a complaint is inappropriate when there
exists a reasonable prospect that service may yet be obtained. In such
instances, the district court should, at most, quash service, leaving the
plaintiffs free to effect proper service.

11 *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992). Because dismissal without
12 prejudice may implicate statute of limitations concerns, the Court finds that quashing
13 service is the more appropriate remedy at this time. Moreover, under the Ninth Circuit’s
14 four-part test, Pinkerton’s failure to comply with service requirements does not warrant
15 dismissal. *Hamilton*, 981 F.2d at 1065. Hanson has notice of the original complaint, the
16 defect in service is technical, the failure to properly serve the original complaint is
17 justifiable, and Pinkerton could be severely prejudiced if his complaint is dismissed
18 without prejudice. Therefore, the Court denies Hanson’s motion as to the remedy of
19 dismissing Pinkerton’s complaint.

20 **III. ORDER**

21 Therefore, it is hereby **ORDERED** that Hanson’s motion to dismiss for
22 insufficiency of process and insufficiency of service of process (Dkt. 17) is **GRANTED in**

1 **part** and **DENIED in part** and Hanson's motion for extension of time (Dkt. 23) is
2 **GRANTED**. Pinkerton must file an affidavit of service of summons and complaint no
3 later than May 19, 2017. Failure to comply or otherwise respond will result in
4 **DISMISSAL without prejudice** without further order of the Court. Failure to perfect
5 service a third time will most likely result in **DISMISSAL without prejudice**.

6 Dated this 3rd day of May, 2017.

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9 BENJAMIN H. SETTLE
United States District Judge